

Memo Analyzing the Impact of the Supreme Court's Cabela's Decision on Article VII, Section 14 and the Attorney General's Three-Prong Test

Introduction

In 2006, the Supreme Court examined the use of public funds against the backdrop of tax increment financing (TIF) and the prohibition against the donation of public funds provided in Art. VII, Sec. 14(A) of the Constitution in the Cabela's opinion. This memo examines the impact of the Supreme Court's opinion in Cabela's,¹ a case that marked a very important change in analyzing the use of public funds and public property. Significantly, it overturned the Court's earlier decision in *City of Port Allen*.²

The use of public funds and public property is controlled by the limits set forth in Art. VII, Sec. 14 of the Constitution. Art. VII, Sec. 14(A) generally prohibits the state and its political subdivisions from donating public funds or property. The provision states in pertinent part:

"Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private."

Generally, there has been very little interpretation of Art. VII, Sec. 14 over its long history. As noted in the *City of Port Allen* case:

"There is little jurisprudence interpreting the meaning of the 1974 provision. The 1921 Constitution, however, contained a provision which was virtually identical to the present Art. VII, §14(A). Although subject to interpretation on numerous occasions by the Attorney General, the 1921 provision also produced little relevant jurisprudence."

The *City of Port Allen* decision, rendered in 1983, had long provided the limitations on how public funds and property may be used until the Supreme Court's 2006 opinion in Cabela's. Most significant in the *City of Port Allen* was the Court's finding that a public entity must have a legal obligation to transfer public funds or property. The Court stated:

"... even if political subdivisions cooperate for a public purpose, **they still may not give away their assets** to other political subdivisions, the United States government or public or private associations or corporations, or to individuals **merely for a "public purpose."** (Emphasis added.)

The Attorney General held fast to the Court's pronouncement over the years. In Opinion #93-787, the Attorney General described the various ways it described the legal obligation requirement stating:

"This office has construed the "legal obligation" requirement referred to in the *City of Port Allen* decision to be a requirement that the purpose and power for a particular expenditure of public funds be "sanctioned" or "authorized by law" or in the "discharge of a legal duty"."

¹ *Board of Directors of Indus. Development Bd. of City of Gonzales, Louisiana, Inc. v. All Taxpayers, Property Owners, Citizens of City of Gonzales, et al*, 938 So.2d 11 (La. 9/6/06)

² *City of Port Allen, Louisiana v. Louisiana Mun. Risk Management Agency, Inc.*, 439 So.2d 399 (La. 1983).

The Attorney General established a three-prong test based on the *City of Port Allen* case to determine if certain actions by the government or arrangements between public and private entities violated the prohibition on the donation of public property. The legal obligation component was one of the three prongs. The test was:

1. The expenditure or transfer of public funds or property must be based on a legal obligation or duty;
2. The expenditure must be for a public purpose; and
3. The expenditure must create a public benefit proportionate to its cost.

In Opinion #93-787, the Attorney General also expressly rejected the notion that remunerative donations would be allowed under the Constitution. The Attorney General said:

“You have also requested this office to give consideration to the argument that “remunerative donations” may not be constitutionally prohibited. **In light of our opinion that a legal obligation for the expenditure of public funds must be present if same is to be considered constitutionally sanctioned, a discussion of “remunerative” donations is pretermitted.**” (Emphasis added.)

The Supreme Court would later reject *City of Port Allen* based on finding that remunerative donations were acceptable under the Constitution.

In 2006, the Court repudiated its earlier interpretation of Art. VII, Sec. 14(A) in the *City of Port Allen* case by rejecting the legal obligation requirement. The Court, instead, considered whether there were reciprocal obligations between the parties to approve the transactions presented to the Court to ensure it was not a gratuitous transaction. The Court’s analysis is examined in detail in Section IV, Part B of this memorandum. The Attorney General announced a new three-prong test in 2007. It is:

1. A public purpose for the expenditure or transfer;
2. That the expenditure or transfer, taken as a whole, does not appear to be gratuitous;
3. Evidence demonstrating that the public entity has a reasonable expectation of receiving a benefit or value at least equivalent to the amount expended or transferred.

The Supreme Court made two significant decisions in the Cabela’s opinion that change the analysis of projects using public funds or property. First, the Court broadly interpreted the TIF act to allow the use of TIFs for almost any kind of business. Second, the Court transformed the analysis of its interpretation of Art. VII, Sec. 14 by rejecting the idea that a legal obligation must be a predicate for using public funds or property. Instead of a legal obligation, there must be reciprocal obligations between the parties to ensure that there is not a gratuitous donation of public funds. As a result of this new jurisprudence, there is an even greater emphasis on the strength of the promises recorded in a contract or cooperative endeavor agreement and its ongoing oversight by the participating governmental entity.

I. Summary of Projects and Funding in Cabela's

A. Projects

To promote economic development, various entities of the City of Gonzales (City) and the State of Louisiana entered into several agreements and issued tax increment revenue bonds to develop a project resulting in a Cabela's Retail Center and a Sportsman Park Center (Cabela's). The project involved the use of Tax Increment Financing as provided in La. R.S. 33:9038.1 *et seq.* (the "TIF Act").

Cabela's sought to acquire 49.22 acres of property located in the Gonzales Economic Development District No. 1 (District) from Carlisle Resort (Carlisle) and construct, furnish and equip a 165,000 square foot retail facility, which would specialize in hunting, fishing, camping and outdoor gear. Cabela's also planned to cooperate with Carlisle in the development of other real estate in the District for complimentary retail and commercial ventures. Upon issuance of the bonds, Cabela's was to transfer title of the Cabela's property and facilities to the Directors of the Industrial Development Board (Board).

The Board would then enter into an agreement to lease the property and facilities to Cabela's and the lease would contain an option to purchase. Cabela's would manage and maintain the Cabela's Retail Center, including a museum, pursuant to an agreement executed between Cabela's and the Board. Additionally, the Agreement stated that Carlisle would develop 48.5 acres of its real estate as a Sportsman Park Center, which is located adjacent to the Cabela's Retail Center and within the District, for purposes of attracting certain complimentary retail and commercial ventures.

B. Financing

In order to finance the project, the Board would issue tax increment revenue bonds in an amount not to exceed \$49,875,000, which would be purchased by Cabela's and Carlisle. Specifically, the bonds would be purchased on a "pay-as-you-go" basis, and Cabela's would purchase up to \$42,375,000 of the bonds while Carlisle would purchase up to \$7,500,000 of the bonds. Proceeds of the bonds would be advanced by Cabela's and Carlisle to the Board or the City on a pro-rata basis when needed to fund the construction to be paid with proceeds of the bonds. The payment of the bonds was secured by the annual pledged state increment, which amounts to 1.50% of State sales and use tax collected within the District up to a maximum total amount of \$10,500,000, and the annual pledged local increment, which amounts to 1.50% of the City sales and use tax collected within the District.

II. Parties and Papers

A. Parties to the Agreements/Project Documents:

1. Cabela's Retail LA, LLC (Cabela's) is a leading specialty retailer of hunting, fishing, camping and related outdoor merchandise. According to Hoover's,³ Cabela's was

³ Hoover's, Inc. is a business research company that provides information on U.S. companies and industries.

founded in 1961 and employs 11,700. It operates mainly through the 135 million-plus catalogs it mails each year, but also has 20 stores that are as big as 250,000 sq. ft. and include such features as waterfalls, mountain replicas, aquariums, and banquet and meeting facilities.

2. Carlisle Resort, LLC (Carlisle) is an investment entity that bought the 64-acre site used for the Cabela's project in 2000 for \$2.35 million.⁴ It is a privately organized entity that filed with the Secretary of State on 1-10-97;⁵
3. Louisiana Department of Revenue (State of Louisiana or the State);
4. Gonzales Economic Development District No. 1 (District);
5. City of Gonzales (City); and
6. Industrial Development Board of the City of Gonzales, Louisiana, Inc. (the Board).

B. Agreements/Project Documents

The case generally says that all parties listed above signed the following documents. [Appendix A](#) contains a detailed breakdown of the obligations discussed in the case. The page numbers refer to the Cabela's decision.

1. Cooperative Endeavor Agreement (See pages 6, 15-16)
2. Trust Indenture

The case does not provide any description of this document.

3. Lease Agreement with Option to Purchase (see page 16)

"The lease agreement ...mandates that Cabela's perform several obligations. Cabela's is obligated to pay rent equal to the actual amount of ad valorem taxes that would be owed if Cabela's itself owned the premises. Additional rents, in the form of all costs for insurance, maintenance, and improvements, are provided for by the lease agreement. Specifically, Cabela's must purchase builders' risk insurance, general liability and property damage insurance during the period of construction, and property damage and comprehensive general public liability insurance upon completion. In addition to the rents discussed above, Cabela's will pay personal property taxes on the equipment and inventory located on the premises. Cabela's will also indemnify the lessor against all liability, claims and suits connected with its use and management of the premises. The lease further provides that Cabela's will contract and pay for all utility services supplied to the premises. Regarding maintenance, the lease obligates Cabela's, at its cost, to repair,

⁴ *The Advocate*, 10-24-00.

⁵ Source: Secretary of State, Corporations Database.

maintain and replace all necessary capital improvements to the leased premises. Additionally, Cabela's, at its cost, must make all other necessary and routine maintenance and repairs to the leased premises that are not otherwise provided for in the Management Agreement.

The lease agreement provides Cabela's an option to purchase the leased premises at the earlier of the expiration or payment in full of the Cabela's bonds. The purchase price of the leased premises would be the fair market value of the leased premises on the date Cabela's exercises its option to purchase. Cabela's would be allowed to take as a credit against the purchase price an amount equal to (1) the amount it paid for the property before it was transferred to the Board; (2) all rent paid by Cabela's to the Board during the lease term; (3) all additional rent paid by Cabela's during the lease term; (4) \$2,500 for each full-time job and \$1,250 for each part-time job created by Cabela's at the Retail Center; (5) \$1,900,000 for each year that Cabela's operated the Retail Center during the Lease; and (6) any amount owed to Cabela's, including the Accrued Management Compensation provided for by the Management Agreement. It is stipulated that in the event these purchase price offsets exceed the purchase price, Cabela's will waive any right to collect the excess from the Board. If the purchase price exceeds the offsets, Cabela's will pay the Board the difference."

4. Public Facilities Management Agreement (see page 15)

"The management agreement generally provides that Cabela's will be responsible for managing the public facilities, including the museum, which shall include maintenance and repairs, with the obligation to expend its own funds for the proper maintenance and repair. Cabela's is obligated to keep accurate account of its expenditures, to operate the museum pursuant to specified guidelines, and to employ personnel to properly maintain the public facilities. In exchange for these duties, Cabela's will be entitled to recover its actual costs arising out of the operation, maintenance and repair of the public facilities, with payment of these costs plus interest being deferred until Cabela's exercises its option to purchase the property in accordance with the lease agreement."

C. Parties to the Lawsuit

Plaintiffs

The Board of Directors, Industrial Development Board of the City of Gonzales, Louisiana, Inc. (the "Board").

Defendants

The Board named as Defendants, the Taxpayers, Property Owners, Citizens of the City of Gonzales.

Amicus Curiae

Baton Rouge Area Chamber;
Ascension Chamber of Commerce;

Ascension Economic Development Corporation; and
Louisiana Department of Economic Development.

III. History and Procedure of the Cabela's Case

A. General Background on TIFs

"Tax increment financing is a method of trapping incremental increases in tax revenues generated from new businesses and using them to fund local government projects. Generally, a state passes enabling legislation allowing city and parish governments to create special taxing districts. The district can be as small as a single building or as large as the government body creating it. The district then issues bonds and spends the subsequent revenue developing the area. Presumably the investments will bring new growth and new tax revenues. The districts use these new revenues to finance the bonds.

When a district is created, tax dollars are essentially divided into two streams. The first stream represents the amount of money the district received in taxes before the creation of the district. The second stream represents all increases in tax collection in the district after it is created. This amount collected in the first stream remains constant. Thus, if a district generated one million dollars in tax revenue before the creation of the district, local taxing authorities will continue to collect one million dollars in tax revenue. The amount in the second stream depends upon the level of new tax dollars collected. Using the one million dollar example, any taxes collected in excess of one million dollars goes into this stream. Presumably increases are attributable to the district's investments, so the district should be able to use this money to fund the redevelopment projects."⁶

B. History and Procedure of the Case

- 4-23-05 Voters approved a rededication of taxes (1% sales tax and .5% sales tax) for use by economic development districts pursuant to the TIF Act.
- 4-25-05 City of Gonzales (City) adopted an ordinance creating an economic development district (District) encompassing a 233-acre tract of land. Several governmental entities adopted resolutions allowing them to enter into various agreements with private entities to carry out and fund the project.
- 7-22-05 The State Bond Commission approved the issuance, sale and delivery of not more than \$49,875,000 Tax Increment Revenue Bonds. Additionally, the State Bond Commission approved the form, execution and delivery of the Agreement. Both approvals were subject to and conditioned upon the Louisiana Joint Legislative Committee on the Budget approving the use of 1.50% sales and use tax from the State.

⁶ Alyssa Talanker and Kate Davis, *Straying From Good Intentions: How States are Weakening Enterprise Zone and Tax Increment Financing Programs*, Good Jobs First, August 2003.

7-27-05 Board filed a Petition for Motion for Judgment pursuant to the Bond Validation Act seeking a judicial declaration of the validity and legality of the Project, the project documents and the bonds.⁷

8-12-05 Joint Legislative Committee on the Budget approved the Project.

8-16-05 Defendants, two Ascension Parish residents, filed a response⁸ to the Board's motion for judgment in which they challenged the constitutionality of the TIF Act and the Agreement to the extent they violated Art. VII, §14.⁹

Trial Court granted the Plaintiff's motion declaring the TIF Act constitutional.

10-7-05 First Circuit Court of Appeal affirmed the Trial Court's decision. The court concluded that a bond issuance secured by the pledge of sales tax increments generated by the Project to fund the Project does not violate Art. VII, §14(A).

1-27-06 Supreme Court granted Writs.

9-06-06 Supreme Court affirmed by a vote of 5-2.

IV. Cabela's Decision

The Supreme Court examined the TIF Act in conjunction with Act VI, Sec. 21 of the Constitution (see Part A below) and Art. VII, Sec. 14 of the Constitution (see Part B below) in determining the validity of a bond issuance by an industrial development board for the

⁷ Specifically, the Board prayed for a judicial determination approving:

- (1) the legality and validity of the bonds;
- (2) the legality and validity of all proceedings held and actions taken by the Board in connection with the authorization or issuance of the bonds;
- (3) the legality and validity of the project documents and all other documents executed in connection with the issuance of the bonds and all terms and provisions contained therein;
- (4) the legality and validity of all proceedings held and actions taken by the Board in connection with the authorization and execution of the project documents and all other documents executed in connection with the bonds;
- (5) the exemption of the bonds and income therefrom from all taxation in the State in accordance with La. R.S. 33:9038.8;
- (6) the exemption of the Project from the Public Bid Law; and
- (7) the legality and validity of the rededication of the sales and use tax pledged to finance the bonds. The Board also asked the court to issue a permanent injunction against any person's institution of an action or proceeding contesting, among other things, the legality and validity of the bonds, the project documents, the pledges of revenue, and the legality and validity of the TIF Act and the Act's authorization of the project documents and transactions contemplated thereby.

⁸ They asserted a peremptory exception of no cause of action.

⁹ Defendants also excepted to the Board's use of public funds to subsidize a particular retailer, and maintained that such action violated the Equal Protection Clauses of the federal and state constitutions because of its unequal treatment of similarly situated retail sporting goods stores.

construction of a private retail center. The Court found the TIF Act was constitutional; there was no violation of Art. VII, Sec. 14 and upheld the validity and legality of the project.

A. TIF Act and Art. VI, Sec. 21 (Assistance to Local Industry)¹

The Court's analysis began with the tax increment financing (TIF) statute. Tax increment financing is authorized by the Cooperative Economic Development Law, R.S. 33:9020, *et seq.* Tax increment financing was passed to aid local governmental subdivisions in alleviating the conditions of unemployment, underemployment, and other forms of economic distress presently existing in their areas. There are two types of TIFs: ad valorem¹⁰ and sales.¹¹ The Court was concerned with a sales TIF in Cabela's.

The Court interpreted the TIF law very broadly and decided that TIFs may be used for any kind of business. R.S. 33:9038.34(M) provides:

"The term "economic development project" shall mean and include, without limitation, any and all projects suitable to any industry determined by the local governmental subdivision or, as appropriate, the issuers of revenue bonds, to create economic development. Economic development projects shall include, without limitation, public works and infrastructure and projects to assist the following industries within the meaning of Article VI, Section 21 of the Louisiana Constitution:

- (1) Industrial, manufacturing, and other related industries.
- (2) Housing and related industries.
- (3) Hotel, motel, conference facilities, and related industries.
- (4) **Commercial, retail, and related industries.**
- (5) Amusement, places of entertainment, theme parks, and any other tourism-related industry.
- (6) Transportation-related industries.
- (7) Hospital, medical, health, nursery care, nursing care, clinical, ambulance, laboratory, and related industries.

¹⁰ **Ad valorem TIFs.** R.S. 33:9038.33

¹¹ **Sales TIFs.** R.S. 33:9038.34

Bonds. R.S. 33:9038.34 (A) (1) authorizes the District to issue revenue bonds to finance economic development projects. The bonds are payable "from revenues generated by economic development projects with a pledge and dedication of up to the full amount of sales tax increments annually to be used as a guaranty of any shortfall...."

Sales Tax Increment. R.S. 33:9038.34 (A) (2) defines sales tax increment as:

"that portion of the designated sales tax, hereinafter defined, collected each year on the sale at retail, the use, the lease or rental, the consumption and storage for use or consumption of tangible personal property, and on sales of services ... from taxpayers located within an economic development district which exceeds the designated sales tax revenues and hotel occupancy taxes, occupancy taxes, or similar taxes so designated that were collected in the year immediately prior to the year in which the district was established.

- (8) Any other industry determined by the local governmental subdivision or issuer of revenue bonds, as appropriate, whose assistance will result in economic development.” (Emphasis added.)

The Court said in interpreting this provision:

“...the TIF Act allows the public financing of any project in any industry that the local governmental subdivision has determined will create economic development.” (Emphasis added.)

(Note: The Dissenting opinion in the First Circuit’s decision pointed out that the court could have limited the scope of R.S. 33:9038.34 M by finding the TIF Act contained projects that fell outside of the industries that may receive aid as set out in Art. VI, Section 21 that allows assistance to local industry.²)

The Court went on to interpret the second sentence of R.S. 33:9038.34 M saying it:

“...illustrates the types of projects and industries that may be induced and encouraged, as contemplated by La. Const. art. VI, § 21, by the public financing, but is not an exhaustive or exclusive list of the allowable projects. In light of the plain and broadly inclusive language utilized in the statute, we conclude that the legislature intended the TIF Act to be utilized for a project such as the one presented in this case.” (Emphasis added.)

Thus, the Court determined that the project was valid under the TIF Act and within the type of projects contemplated under Art. VI, Sec. 21 of the Constitution. Art. VI, Sec. 21 states in its entirety:

“(A) Authorization. In order to:

- (1) induce and encourage the location of or addition to **industrial enterprises** therein which would have economic impact upon the area and thereby the state,
- (2) provide for the establishment and furnishing of such industrial plant, or
- (3) provide movable or immovable property, or both, for pollution control facilities, the legislature by law may authorize, subject to restrictions it may impose, any political subdivision, deep-water port commission, or deep-water port, harbor, and terminal district to
 - (a) issue bonds, subject to approval by the State Bond Commission or its successor, and use the funds derived from the sale of the bonds to acquire and improve industrial plant sites and other property necessary to the purposes thereof;
 - (b) acquire, through purchase, donation, exchange, and (subject to Art. I, Section 4) expropriation, and improve industrial plant buildings and industrial plant equipment, machinery, furnishings, and appurtenances; and
 - (c) sell, lease, lease-purchase, or demolish all or any part of the foregoing.

(B) Property Expropriated; Sale to Aliens Prohibited. No property expropriated under the authority of this Section shall ever, directly or indirectly, be sold or donated to any foreign power, any alien, or any corporation in which the majority of the stock is controlled by any foreign power, alien corporation, or alien.

(C) Exception. This Section shall not apply to a school board.” (Emphasis added.)

B. Art. VII, Sec. 14 Prohibition on Donations

The Court turned its attention to Art. VII, Sec. 14 of the Constitution after concluding that the project was valid under both the TIF law and Art. VI, Sec. 21 of the Constitution. Art. VII, Sec. 14(A) generally prohibits the state and its political subdivisions from donating or transferring public funds or property. The provision states in pertinent part:

“Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision **shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private.**” (Emphasis added.)

The Court found: “Although the language [of Art. VII, Sec. 14] is clear and unambiguous; it seeks to prohibit a gratuitous alienation of public property.” (Emphasis added.) The Court examined various legal sources including the types of donations allowed under the Civil Code (gratuitous,¹² onerous¹³ and remunerative) and the transcripts of the 1974 Constitutional Convention. The Court found that the use of the term ‘donation’ in the Constitution “...envision[s] a gratuitous intent” similar to the definition of gratuitous donation in Civil Code article 1523. The Court said:

“Numerous commentators have equated the term “donation” with a gratuitous donation, intertwining the concept of gratuitous intent into discussions of donations.” (Emphasis added.)

The Court then strongly critiqued its earlier decision in the *City of Port Allen* decision and repudiated it stating:

“...we find little support for the proposition that §14(A) is violated when the State or a political subdivision seeks to give up something of value when it is under no legal obligation to do so. The cases cited by the court in *City of Port Allen* are **neither persuasive nor particularly applicable**. Additionally, **the analysis seems unworkable** because the State and its political subdivisions often, and without apparent constitutional violation, enter into contracts to buy goods, such as office supplies, without being under a legal obligation to do so. We agree with the criticism of a distinguished commentator.”

The Court went on to quote Professor Lee Hargrave at length. Hargrave found the emphasis on the legal obligation requirement to be misguided. In Hargrave’s view, the analysis should instead focus whether the “...donations are transfers based on a gratuitous cause as

¹² **Civil Code art 1523.**

A gratuitous donation is “...that which is made without condition and merely from liberality; The onerous donation, or that which is burdened with charges imposed on the donee.” (Emphasis added.)

¹³ **Civil Code art. 1524.**

The onerous donation is not a real donation, if the value of the object given does not manifestly exceed that of the charges imposed on the donee.

opposed to an onerous one.”¹⁴ This is a significant departure in the interpretation of Art. VII, Sec. 14 because the Court had considered the legal obligation requirement necessary for approving the transfer of public funds.¹⁵

The Court then examined all of the agreements between the parties and related documents to gain “...insight into the intent of the parties...” and said the documents “...reveal that neither the State nor the City intend to enter into a gratuitous contract with Cabela's and Carlisle.” The Court found that the project challenged by the lawsuit was non-gratuitous because both private and public parties have obligations and “...expect to receive something of value in return for the performance of their obligations.”

Therefore, so long as reciprocal obligations exist between the parties where public funds are transferred or exchanged there would not be a gratuitous donation violative of the Constitution. This would be a fact sensitive analysis decided on a case-by-case basis. It is not clear what the minimum obligation would be to ensure that it was not gratuitous. The Court found there were “real and substantial obligations undertaken by Cabela's in exchange for the tax increment financing.” The Court's evidence of reciprocal obligations were:

- The bonds are not secured by the full faith and credit of the state or of any political subdivision.
- Both the State and the City expect to receive something of value in return for the performance of their obligations.¹⁶

¹⁴ Lee Hargrave, *Limits on Borrowing and Donations in the Louisiana Constitution of 1975*, 62 La.L.Rev. 137 (2001). “Another problematic issue stemming from the Port Allen analysis is the court's statement that the constitutional provision is violated “whenever the state or a political subdivision seeks to give up something of value when it is under no legal obligation to do so.” That statement can make no sense without distorting the meaning of the words. The state obviously can give up funds to buy things even though it has no legal obligation to buy the thing. The state can invoke its credit to borrow money even though it has no obligation to borrow. Looking at the authorities the court cites to support its statement, it appears they were not on point, but dealt with intergovernmental transfers of funds and payment of moving expenses to owners of expropriated property. And of course, governments can make donations under any of the exceptions stated in Section B even if those are discretionary rather than being compelled. It probably would be simpler to analyze these matters in the traditional system used by the civil code since before statehood-donations are transfers based on a gratuitous cause as opposed to an onerous one. The Port Allen risk management scheme was not based on a gratuity but on a system for uniting to generate greater leverage to secure insurance and self insurance management.” (Emphasis added.)

¹⁵ The Attorney General stated in Opinion # 96-291 the following:
“As we interpret that decision, the legal obligation referred to must be present even if the external agency (e.g., the Association) provides a public benefit or service, and even if the services provided are consistent with, and supportive of the duties and functions of the Village. Attorney General Opinion No. 93-787”.

¹⁶ The Agreement states:
“The State hereby acknowledges that there is a reasonable expectation that the Project will result in economic development within the State which will exceed the value of the obligations of the State contained herein thereby serving a public purpose.” (Emphasis added.)

In sharp contrast, the dissenting opinion did not find any reciprocal agreement and that the Constitution had been violated.¹⁷ Traylor stated:

“An examination of the financing structure suggests that the Board, and the Board alone, is bearing all the financial burden of financing this privately owned enterprise, an act specifically prohibited by Art. VII, Section 14(A). The financing scheme appears more akin to a disguised donation of public lands and funds rather than a lease agreement, and **should Cabela's elect not to exercise its option to purchase, would amount to a loan of public funds and property.**” (Emphasis added.)

In conclusion, the Supreme Court repudiated its earlier decision in *City of Port Allen* analyzing what constitutes a prohibited donation under the Constitution. The Cabela's opinion rejected the need to find that the public entity had a legal obligation to allow the use of public funds or property. The new analysis requires that the transfer by the public entity be non-gratuitous. A non-gratuitous transfer would be one that contemplates a set of reciprocal benefits and obligations between the public and private entities.

V. Attorney General Opinions

A. Background to the Attorney General's Original Three-Prong Test

In interpreting Art. VII, Sec. 14, the Attorney General followed the guidelines stated in *City of Port Allen v. Louisiana Risk Management, et al.*, 439 So.2d 399 (La. 1983), which held that Art. VII, Sec. 14 was violated “whenever the state or a political subdivision seeks to give up something of value when it is under no legal obligation to do so.” The Attorney General consistently opined since *City of Port Allen* that a three-prong test for the use of public funds must be met. The test was:

1. The expenditure or transfer of public funds or property must be based on a legal obligation or duty;
2. The expenditure must be for a public purpose; and
3. The expenditure must create a public benefit proportionate to its cost.

The Supreme Court repudiated its decision in *City of Port Allen* in the Cabela's opinion discussed in Part III. The Attorney General's three-prong test has evolved post-Cabela's. The legal obligation component has been abandoned in favor of examining whether there was a non-gratuitous transfer of public funds. A review of the Attorney General's opinions following the Cabela's decision is presented below.

B. Development of Attorney General's Three-Prong Test(s) Post-Cabela's

The Attorney General has issued several opinions following Cabela's.¹⁸

¹⁷ Justice Traylor authored the Dissenting Opinion with Justice Knoll joining.

¹⁸ Other AG opinions issued post-*Cabela's* not discussed in this memorandum include: 06-0337, 06-0286, 06-0315, 07-0097, 07-0060, and 07-0057.

1. Attorney General Opinions

The Attorney General first acknowledged the Cabela's decision in a December 15, 2006 opinion (#06-0292). In the opinion, the Attorney General approved the reimbursement of public employees who had received NSF checks from the Office of Group Benefits' (OGB) third party administrator. In exchange for the reimbursement, the employees would assign the NSF checks to OGB. OGB would then seek payment as a bankruptcy creditor.

The Attorney General noted in the opinion that the Supreme Court in Cabela's had stated the following:

“...**articulated a new standard** which essentially holds that Art. VII, Section 14 is violated ‘only when the public funds or property are gratuitously alienated.’ Therefore, it follows that the determination of whether a payment of money is a gratuitous donation or earned compensation **ultimately depends on the circumstances and essentially is a factual determination.** As a general rule, the Attorney General's Office refrains from conducting factual evaluations. However, based upon the information provided to our office and the test articulated in the *City of Gonzales*, we are of the opinion that your proposed disbursement is acceptable.” (Emphasis added.)

2. December 2006 Opinions

The Attorney General modified the three-prong test in Opinions #06-0307 and #06-0314 released on December 28, 2006. (The same assistant attorney general wrote the opinions). The Attorney General determined in Opinion #06-0307 that the construction of a bridge by a gas district to be privately owned was not a prohibited donation of public funds. The Attorney General applied the facts to each prong of the test:

a. Non-gratuitous: the Gas District would receive value in exchange for the construction of the bridge including the ability to relocate a pipeline servitude, the right to drill in adjacent property and other advantages.

b. Public Purpose: The bridge would help the Gas District provide natural gas to various public entities.

c. Benefit Proportionate to the Public Property. Interestingly, the Attorney General says the following: “Although we are not in a position to determine whether the proposed expenditure is proportionate to the perceived public benefit, we do believe the Gas District has the requisite authority to expend public funds ...”

The Attorney General determined in #06-0314 that the construction of a boat ramp landing partially funded by a Levee District with sole ownership and management vested with the Police Jury was not a prohibited donation of public funds.

The test provided in #06-0307 was:

- (1.) The political subdivision must have a reasonable expectation of receiving something of value in exchange for the proposed expenditure of public funds;
- (2.) The non-gratuitous alienation of public funds must be for a public purpose; and
- (3.) It must create a public benefit proportionate to the value of public property or funds alienated or transferred.

The test provided in #06-0314 was:

- (1.) The entity must have a reasonable expectation of receiving something of value in exchange for the proposed expenditure of public funds;
- (2.) The agreement is for a public purpose; and
- (3.) The cost must be proportionate to the public benefit.

3. February 2007 Opinion

The Attorney General did not restate the three-prong test but did note that the opinion issued in #06-0328 would have been different before Cabela's was decided. The Attorney General was asked to determine if a Port District had to honor a lease where the lessee had abandoned the property. The lease stipulated that rent was to be paid for the initial term (thirty years). In lieu of rent the District expected to receive the facilities constructed on the property estimated to be valued at \$3.2 million. In addition, the District hoped to spur economic development through the project. The Attorney General said of the arrangement:

“One initial matter that we must consider regarding the validity of the subject lease is whether it constitutes an improper donation of public assets under La. Const. Art. VII, Sec. 14. Because no rent was required of the lessee for the initial term of the lease **and because it is speculative, at best, that the condition of the constructions on the leased property will be commensurate with the value of the foregone lease payments over the term of the lease this situation is questionable under La. Const. Art. VII, Sec. 14.**” (Emphasis added.)

The Attorney General went on to state:

“Although we may have been of the opinion that the **speculative nature of the return anticipated by the District** under the lease (i.e., the fact that, in 2032, the District may receive thirty-year-old buildings that may or may not be equal to the value of the rental payments that the District had foregone for that period) **would have constituted an improper donation of State assets under *City of Port Allen, supra*, we are hard-pressed to reach the same conclusion following the Louisiana Supreme Court's opinion in *Board of Directors, supra*.** Although

the **return** anticipated by the District when the lease was perfected **may have been speculative, the expectation appears to have been that the return would be substantial.** In our opinion, such a situation appears to make the lease valid under Board of Directors, *supra*, as the property was not “gratuitously alienated.” *Id.* at 23. Thus, it is our opinion that the lease does not constitute an invalid donation under La. Const. Art. VII, Sec. 14.” (Emphasis added.)

In summary, the pre-Cabela's standard would have resulted in a more restrictive response from the Attorney General. In Opinion #06-0328, the Cabela's decision appears to open the door to a speculative venture that has the slight possibility of yielding a high return for the public benefit. However, although the Attorney General found that Art. VII, Sec. 14 was not violated, it strongly advised the District to seek a declaratory judgment regarding the validity of the lease as it may not be enforceable under a contractual analysis.

4. March 2007 Opinion

The Attorney General announced a new three-prong test in Opinion #07-0018. The Attorney General said:

“Whether public funds or property are “gratuitously alienated” ultimately depends on the facts and circumstances surrounding the proposed expenditure or transfer. As a general rule, the Attorney General's Office refrains from conducting factual evaluations.

However, in order to be acceptable, we believe a cooperative endeavor agreement must now meet the following three requirements:

- (1.) The entity must have the legal authority to enter into the agreement;
- (2.) The agreement is for a public purpose; and
- (3.) There is a reasonable expectation of receiving equivalent value in exchange for the proposed expenditure or transfer of public funds or property.” (Emphasis added.)

The Mayor of Simmesport asked the Attorney General in Opinion #07-0018 if an amended cooperative endeavor agreement that he had not signed was enforceable. The Agreement and Amendment were to build a housing development called Canadaville. The Amendment, not signed by the mayor, would have relieved Canadaville from most of the obligations required under the original Agreement. The Attorney General decided that it appeared that the town met two of the three prongs of the test. In regards to the third prong, the Attorney General concluded that:

“...if there is not a reasonable expectation of the part of the Town to receive equivalent value for the original obligations that are to be released by the Town in the Amended Agreement, then the signing the Amended Agreement may constitute a donation of public funds or property...” (Emphasis added.)

5. May 2007 Opinion

The Attorney General announced another three-prong test in #07-0134. First, the Attorney General expressed criticism of the Cabela's case for the first time saying:

"Although the court announced this new standard, they gave very little, if any guidance as to how that standard is to be applied." (Emphasis added.)

The Attorney General goes on to announce the new test stating:

- (1.) "A public purpose for the expenditure or transfer;
- (2.) That the expenditure or transfer, taken as a whole, does not appear to be gratuitous; and
- (3.) Evidence demonstrating that the public entity has a reasonable expectation of receiving a benefit or value at least equivalent to the amount expended or transferred." (Emphasis added.)

However, the Attorney General did include statements from Cabela's where the Court seemed to indicate that the benefits should exceed the state's obligations. The Court noted that the Agreement contained a provision that "The State hereby acknowledges that there is a reasonable expectation that the Project will result in economic development within the State which will exceed the value of the obligations of the State contained herein thereby serving a public purpose." (Emphasis added.)

The Attorney General goes on to express concern in determining whether an expenditure is gratuitous stating:

"We glean three things from the Cabela's case when it comes to determining whether an expenditure is gratuitous. First, it is evident that there must be a public purpose when expending funds. Second, the transaction must be looked at as a whole, and can't appear to be gratuitous on its face. Third, public entities must have an expectation of receiving something of value when expending public funds. **The Cabela's decision doesn't make it clear exactly what that value is or how it is calculated.** In Cabela's, the non-gratuitous intent of the public entities was demonstrated upon a showing by the entities that **they expected to receive more than what they gave up.** While the Court didn't state that such a showing was necessary, it did make it clear that such a showing was an important factor in its decision. Therefore, it is clear to our office that a public entity must receive **more than a nominal return or some minimal value** in order for an expenditure to be non-gratuitous. If a public entity can show that it **reasonably expects** to receive **at least equivalent value** for the funds it expends or property it transfers, that would seem to show a non-gratuitous intent." (Emphasis added.)

This opinion suggests that certain speculative arrangements would not be found acceptable as the public entity would not have a reasonable expectation of receiving a

sufficient benefit. This suggests a more restrictive view of Cabela's that appears to run counter to the Attorney General's comments in Opinion #06-0328 discussed earlier.

6. June 2007 Opinion

In Opinion #07-0154, the Attorney General was asked whether a drainage district, a development district and a parish could enter into a cooperative endeavor agreement. The drainage district sought to pledge the proceeds of certain sales and use taxes to secure bonds. The bonds would finance drainage improvements. The Attorney General found the agreement met the requirements of the three-prong test.

The Attorney General also reiterated its criticism of Cabela's noted in Opinion #07-0134.

In Opinion #07-0132, the Attorney General was presented with a question regarding the payment of legal fees incurred prior to a sheriff formally taking office. The fees were related to issues related to the running of the sheriff's office prior to the current sheriff taking his oath. The Attorney General said that a prohibited donation would have been found if considered prior to the Cabela's decision because there was no legal obligation for the sheriff's office to pay the legal fees. However, the decision post-Cabela's supports payment of the fees because the sheriff's office received a benefit from the services. The Attorney General conditioned approval of payment on the attorney fees being reasonable.

Conclusion

The Supreme Court's decision in Cabela's has changed the analysis of projects using public funds or property to ensure that they do not violate the Constitution or state law. The Court made two significant decisions in the Cabela's opinion. First, the Court broadly interpreted the TIF Act to allow the use of TIFs for almost any kind of business. Second, the Court transformed the analysis of its interpretation of Art. VII, Sec. 14 by rejecting the idea that a legal obligation must be a predicate for using public funds or property. Instead of a legal obligation, there must be reciprocal obligations between the parties to ensure that there is not a gratuitous donation of public funds.

The Court's interpretation of the donation provision in the Constitution and the TIF statute appears to have opened the door to providing public funds for more economic development ventures. As a result, this new jurisprudence places even greater emphasis on the responsibility of public officials to protect the public fisc. The chief safeguard lies in the strength of the promises recorded in a contract or cooperative endeavor agreement and its ongoing oversight by the participating governmental entity. The agreement must clearly identify the public purpose for the expenditure or transfer; describe how the benefit offered is at least equivalent to the public funds or property used; and detail the reciprocal obligations between the parties.

Quantifying the potential return on the government's investment is a difficult and highly subjective task. It is a task that requires reliance on sound research and analysis devoid of unrealistic claims. It is incumbent upon both state and local government to serve as good stewards on behalf of the public and take all reasonable measures to ensure that public funds and property are used wisely.

End Notes:

¹ Note: The statutes referred to in Cabela's have been renumbered by Acts 2006, No. 850 as follows:

R.S. 33:9038.1 to 33:9038.11 were redesignated as R.S. 33:9038.31 to 33:9038.41.
R.S. 33:9038.21 to 33:9038.27 were redesignated as R.S. 33:9038.51 to 33:9038.57.
R.S. 33:9038.4(A)(1) is now R.S. 33:9038.34(A)(2).

² Dissenting opinion by First Circuit Judge Parro (with Judge McDonald joining):

"...the only way the financing scheme for this Project can be constitutional is if there is some constitutional authority for this subsidizing of a private business entity. Legislative authority in the form of the TIF Act will not suffice." He goes on to comment on Article VI, Sec. 21 saying:

"The key to this article of the Louisiana Constitution is the use of the words, "industrial enterprises," "industrial plant," "industrial plant sites," "industrial plant buildings and industrial plant equipment, machinery, furnishings, and appurtenances." The consistent and repeated use of the modifier, "industrial," emphasizes that the drafters of this article intended to limit it to a particular type of enterprise, not just any business venture that might have some positive economic impact on the area or the state. Constitutional provisions must be given their ordinarily understood meaning, using the same rules of interpretation that govern the interpretation of statutes. *Caddo-Shreveport Sales and Use Tax Comm'n v. Office of Motor Vehicles*, 97-2233 (La.4/14/98), 710 So.2d 776, 780. The word, "industrial," is generally understood to encompass a manufacturing process or an enterprise using heavy equipment and/or complex technology to produce or assemble a product. The word is never understood as the equivalent of "retail," and in fact, is more likely to denote the opposite of "retail."

Had the drafters of the Louisiana Constitution wanted to allow public funds to be used for any type of "economic or industrial development," they could certainly have broadened the constitutional authority in Article VI or created another exception to the prohibition in Article VII, § 14(A). In fact, no less than six separate attempts have been made to amend and expand the Louisiana Constitution to allow governmental entities to use public funds to directly or indirectly subsidize private business entities in order to further "economic or industrial development" in various ways. Each of those proposed amendments were defeated, indicating clearly that the public does not want its tax dollars to be spent for the benefit of selected private enterprises under the banner of "economic development."

For these reasons, I do not believe there is constitutional authority for this particular use of public funds, which amounts to a donation of thirty years' rent-free use of property purchased and constructed by a governmental entity using tax dollars. Accordingly, I respectfully dissent."